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No. 89-1675

In the Supreme Court of the United States

OCTOBER TERM, 1990

CARL CARTER, ET AL., PETITIONERS

v.

FRED T. GOLDBERG, JR.,
COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 7121(a) of Title 5, U.S.C., provides that the grievance procedures set out in a collective bargaining agreement governing federal employees "shall be the exclusive procedures for resolving grievances which fall within its coverage." The question presented is whether this provision limits federal employees with grievable claims under the Fair Labor Standards Act to the remedies provided by the grievance procedures in the applicable collective bargaining agreement.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-13a) is not yet reported. The opinion of the panel of the court of appeals (Pet. App. 14a-37a), which was subsequently vacated, is reported at 883 F.2d 1563. The decision of the district court (Pet. App. 38a-47a) is reported at 690 F. Supp. 897.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 30, 1990. The petition for a writ of certiorari was filed on April 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The seven named petitioners, who are members of bargaining units represented by the National Treasury Employees Union, are employed by the Internal Revenue Service as revenue officers and tax auditors. The IRS determined that petitioners are exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* Petitioners filed suit in the United States District Court for the Central District of California alleging that the IRS had erred and that they were entitled to FLSA overtime pay for the overtime hours that they had worked. Pet. App. 2a, 38a.

The district court granted the government's motion to dismiss. Pet. App. 38a-47a. It noted that it was undisputed that petitioners' claims for FLSA overtime pay are "grievable through the collective bargaining agreement." *Id.* at 40a. Since 5 U.S.C. 7121(a), part of the Civil Service Reform Act of 1978 (CSRA), provides that the grievance procedures set out in a collective bargaining agreement governing federal employees "shall be the exclusive procedures for resolving grievances which fall within its coverage," the court held that it lacked subject matter jurisdiction over petitioners' claims.

The en banc Federal Circuit affirmed the decision of the district court by an eight-to-one vote. Pet. App. 1a-13a; Pet. Supp. Br. App. 1a-3a. Like the district court, it relied on the fact that the grievance procedure in the collective bargaining agreement applied to the dispute and that Section 7121(a) provides that an applicable grievance procedure is exclusive. The en banc court also noted that Congress had listed matters for which grievance procedures are not exclusive in Section 7121(d) and Sec-

tion 7121(e), and had further provided in Section 7121(c) that certain matters are not grievable, but had not listed FLSA overtime claims in any of those exceptions to the general rule of exclusivity. Moreover, the court added, it was clear that the "absence of an express provision for overtime claims is not the product of congressional inattention to the FLSA," since the Senate version of the bill that was enacted had included FLSA claims in the exception in Section 7121(c) but the conference committee had deleted that provision. Pet. App. 7a.

ARGUMENT

The decision of the en banc Federal Circuit is correct. That court is uniquely competent in federal personnel matters; indeed, as petitioners note (Pet. 6-7 n.4), it has exclusive jurisdiction to entertain appeals in cases of this sort. 28 U.S.C. 1295(a)(2). There is no reason for further review of its decision in this case.

As the court of appeals concluded, the unambiguous language of Section 7121(a) resolves the question presented. That exclusivity provision states that the grievance procedures set out in a collective bargaining agreement "shall be the exclusive procedures for resolving grievances which fall within its coverage." Since petitioners could file grievances under the applicable collective bargaining agreement raising the same claims that they seek to bring to court, their claims are precluded by the exclusivity provision of the CSRA.

Moreover, as the court of appeals stressed, the structure and legislative history of Section 7121 make clear that Congress intended that result. As the court noted, the Senate had included FLSA mat-

ters in Section 7121(c), which makes certain issues non-grievable. But while the conference committee retained some matters (such as retirement, life insurance, national security suspensions, and classification matters) on the list of non-grievable items, it deleted FLSA matters from that list. In doing so, Congress did not add FLSA disputes to the list of matters (such as challenges to adverse personnel actions) which, under Sections 7121(d) and 7121(e), may be raised either by the filing of a grievance or by initiating other proceedings.[1] Thus, Congress knew how to except matters from the exclusivity provision and considered whether to do so in the case of FLSA overtime pay disputes, but chose not to include such disputes in the list of exceptions.

Petitioners nevertheless contend (Pet. 7-12) that the result they urge is mandated by this Court's decision in *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), a private-sector case in which the Court held that the plaintiffs were not barred from bringing an FLSA action by the exclusivity provision in a collective bargaining agreement. But this Court made clear in *Karahalios* v. *National Federation of Federal Employees*, 109 S. Ct. 1282 (1989), that "private sector law is not controlling in the context of federal labor controversies." Pet. App. 11a. That is certainly the case here, where a federal *statute*, not a provision of a collective bargaining agreement, makes the grievance procedure

[1] Petitioners argue that the references in Section 7121(d) and Section 7121(e) are only to "administrative" and not to judicial procedures. Pet. 17-19. That argument is without merit: it finds no support in the text or purpose of the statute, and indeed the matters listed in Section 7121(e) are subject to both administrative and judicial review. See 5 U.S.C. 7701, 7703.

the exclusive remedy with respect to matters that it covers.[2] Since "the CSRA is unique in prescribing 'exclusive' procedures for the resolution of grievances" (*ibid.*), private-sector law is not controlling.

Petitioners also argue (Pet. 13-15) that *United States* v. *Fausto*, 484 U.S. 439, 453 (1988), supports their contention because the Court, while holding that the CSRA had impliedly repealed a judicially created cause of action, suggested that it might reach a different result in the case of a cause of action grounded in express statutory text. However, contrary to petitioners' contentions, no repeal by implication is at issue here. The exclusivity provision of Section 7121(a) is clear and explicit. At the same time, federal employees who are not represented by unions can bring suit under the FLSA. Moreover, petitioners, acting through their union, can seek to preserve their ability to enforce their FLSA rights through lawsuits by negotiating for a provision excepting FLSA disputes from coverage under the grievance provision of their collective bargaining agreement.

For the same reason, there is no merit to petitioners' contention (Pet. 10) that a grievance remedy is deficient because arbitrators cannot award all of the

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[2] Thus, *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557 (1987), also relied upon by petitioners (Pet. 14), is similarly not in point. Like *Barrentine*, the *Buell* case dealt with the private sector. And like *Barrentine*, the case did not involve a statute that expressly provides for the exclusivity of grievance procedures, although the statute in question (the "minor disputes" provision of the Railway Labor Act, 45 U.S.C. 153 First (i)) has been construed to preempt parallel remedies under state law. See *Andrews* v. *Louisville & Nashville Ry.*, 406 U.S. 320, 325 (1972); see also *Buell*, 480 U.S. at 565-566.

relief available in court actions, particularly liquidated damages. Given the many advantages of the grievance system—advantages that include expedition and informality—federal employees might reasonably choose to pursue FLSA disputes through that channel rather than in court. But if federal employees decide that the ability to obtain liquidated damages from a court outweighs the advantages of the grievance system, they can seek to make FLSA matters non-grievable.

Finally, there is no merit to petitioners' contention (Pet. 13) that it is "inconceivable" that Congress "extinguished" federal employees' FLSA rights four years after it extended the Act's coverage to those employees. Petitioners retain their rights under the FLSA; the only question is whether, in some circumstances, established grievance procedures are the exclusive means of enforcing those rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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